

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SAMANTHA RUFF on behalf of LMF,

Plaintiff,

-against-

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,
Defendant.

14 Civ. 2433

OPINION

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A P P E A R A N C E S:

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USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: 2/18/15
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Sweet, D.J.

Plaintiff Samantha Ruff ("Ruff" or the "Plaintiff") on behalf of minor L.M.F. ("LMF") has moved pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for judgment of disability of LMF and the grant of Supplemental Security Income ("SSI") benefits, reversing the decision of the Defendant Carolyn W. Colvin, Acting Commissioner of Social Security (the "Commissioner" or the "Defendant"). The Commissioner has moved for judgment affirmed denying eligibility under the Social Security Act (the "Act"), as amended by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA" or the "1996 Act"), Public Law 104-193. Disability turns on whether or not the record contains substantial evidence that a medically determinable impairment or combination of impairments of LMF functionally equals a listed impairment resulting in "marked" limitations in two domains of functioning or an "extreme" limitation in one domain. 20 C.F.R. § 416.926a(a). Based on the conclusions set forth below, the motion of the Plaintiff is denied, the motion of the Commissioner is granted and her decision is affirmed.

Prior Proceedings

Plaintiff filed an SSI application on behalf of LMF on August 4, 2010 alleging that LMF became disabled on February 5, 2010. The claim was denied initially on December 3, 2010. Plaintiff then requested a hearing before an Administrative Law Judge. On August 22, 2012, Plaintiff and LMF appeared and testified before ALJ Robert Lebron (the "ALJ"), with her representative was also present for the video hearing. On November 8, 2012, the ALJ issued a decision finding LMF was not disabled. The Appeals Council denied review on January 15, 2014. The Appeals Council granted Plaintiff an extension of time to file a civil action on March 13, 2014. This action followed on April 7, 2014. The instant motion was marked fully submitted on January 14, 2015.

The Evidence Presented

A. Evidence Prior to August 4, 2010

LMF was born in 1999 and was ten years old on the SSI filing date and thirteen years old on the date of the ALJ decision (see Tr. 26).

Records from LMF's pediatrician's clinic, Liberty Pediatric, reveal that she was seen for generally routine care or minor complaints on two occasions in 2003, twice in 2009, and twice in 2010 (Tr. 345-50). On January 26, 2010, Dr. Darshan Trivedi ("Dr. Trivedi"), LMF's pediatrician at Liberty Pediatrics saw LMF regarding concerns about mood problems (Tr. 346). He noted that one of LMF's girlfriends (GF) had committed suicide (Tr. 346). Physical clinical findings were unremarkable (Tr. 346). The doctor assessed adjustment disorder with depression (Tr. 346).

Livingston Manor Central School District (LM Schools) psychologist Sherry Strassman ("Ms. Strassman") did a behavioral assessment report about LMF on March 8, 2010 (Tr. 214-16). LMF and her sister had moved to the district at the beginning of the school year (Tr. 214). LMF was generally a C student (Tr. 214). Math seemed to be her weakest area, and social development and work habits were well-developed (Tr. 214). Mrs. Julia Rosner, LMF's teacher, described her as getting along well with others, using time wisely, making a good effort, and needing practice in math and writing (Tr. 214). Her recent physical examination was normal (Tr. 214). The Behavioral Assessment System for Children

Assessment 2nd ed. (BASC-2) was administered (Tr. 214-16; see Tr. 380-83). Plaintiff rated LMF's behavior and Mrs. Rosner also rated her behavior (Tr. 215). Overall, Mrs. Rosner's ratings showed an average level of behavioral difficulty, except symptoms of somatization, which was clinically significant (Tr. 215-16). LMF complained about health and pain, and was evaluated as "at risk" overall in this area (Tr. 215-16). Her adaptive abilities in school were average, but she had difficulty at home (Tr. 216). LMF had experienced significant changes in living arrangements that school year, and might be having difficulty adjusting (Tr. 216).

B. Evidence On and After August 4, 2010

Dr. Trivedi completed part of a report to SSA on September 20, 2010, and indicated LMF's sole diagnosis was adjustment disorder with depression (Tr. 335-44). The doctor did not respond to questions regarding clinical findings, test results, symptoms, behavior, or functioning (Tr. 335-44).

On November 15, 2010, Dr. Leslie Helprin ("Dr. Helprin"), a psychologist, consultatively examined LMF (Tr. 355-59). LMF lived with her mother and the mother's boyfriend (Tr.

355). She was able to dress, bathe, and groom herself independently (Tr. 358). LMF traveled independently near their home (Tr. 358). LMF assisted by washing dishes, doing laundry, cleaning her room, cleaning the bathroom, cleaning the table, and serving food (Tr. 358). LMF did homework with help (Tr. 358). Plaintiff said that LMF had good family relationships and adequate peer relationships (Tr. 358). LMF enjoyed drawing, soccer, jump rope, basketball, football, listening to music, and watching television (Tr. 358). She played basketball on weekends with school groups (Tr. 358).

Dr. Helprin noted that LMF was in the 5th grade in regular classes, received extra help in math and writing, and had failed language arts, but earned B's and C's in other subjects (Tr. 355). LMF had never been hospitalized nor had prior outpatient psychiatric treatment (Tr. 355). She started treatment at Synergy in Monticello, New York, in the Spring of 2009, and saw a psychiatrist monthly and a therapist weekly (Tr. 355). She was prescribed Vyvanse and Lamictal (Tr. 355). LMF sometimes had problems falling asleep, and got up at night for a drink (Tr. 355). Plaintiff asserted that LMF had behavioral problems at home, such as sometimes throwing things at home or "stomp[ing] off" when told to do something she did not want to

do (Tr. 355). Plaintiff stated that LMF twice "had an attitude" with her reading teacher (Tr. 355). She also claimed that LMF did things for attention, but she was unable to provide any examples (Tr. 356). Plaintiff said LMF had no problems focusing when playing, only on required tasks (Tr. 356). When the psychologist asked about anxiety and depression, she stated that LMF had fits and would withdraw; and that, before she started medication, LMF sometimes said she wished she were dead (Tr. 356). LMF, however, denied any actual suicidal thoughts, and clarified that she had said this only in anger (Tr. 356). Both LMF and Plaintiff agreed that she never attempted suicide (Tr. 356). Plaintiff said a doctor mentioned somatization based upon LMF often going to the school nurse complaining of (Tr. 356). Dr. Helprin noted that neither Plaintiff nor LMF described any symptoms of thought disorder (Tr. 356). Dr. Helprin conducted a mental status examination and found LMF to be cooperative with age-appropriate social skills, manner of relating, and overall presentation (Tr. 357). She was well-groomed and appropriately dressed (Tr. 357). Her gait, posture, and motor behavior were normal (Tr. 357). Speech was clear, fluent, and age-appropriate (Tr. 357). Thought processes were coherent and there was no evidence of delusion, hallucinations, or paranoia (Tr. 357). Affect was full range and appropriate, and mood was positive

(Tr. 357). LMF was fully oriented and sensorium was clear (Tr. 357). Attention and concentration were mildly impaired as she could not do simple calculations, but could count and do serial 3s (Tr. 357). Recent and remote memory were mildly impaired (Tr. 357). Intellectual skills were in the below average range and fund of information was age-appropriate (Tr. 357). Judgment and insight were age-appropriate (Tr. 357).

Dr. Helprin opined that LMF was able to attend to, follow, and understand age-appropriate directions and complete several age-appropriate tasks (Tr. 358). She was generally able to maintain appropriate social behavior with some occasional difficulties (Tr. 358). LMF was able to respond appropriately to changes in her environment, having behaved appropriately throughout the evaluation (Tr. 358). She generally interacted adequately with peers and adults (Tr. 358). Diagnoses were: bipolar II disorder, generally controlled with medication and rule out borderline intellectual functioning (Tr. 358-59). Dr. Helprin assessed that exam findings appeared consistent with some emotional difficulties, but did not appear significant enough to interfere with LMF's ability to function on a daily basis (Tr. 358).

Dr. Howard Ferrin ("Dr. Ferrin"), a State agency physician, reviewed the record on December 2, 2010, and opined that LMF was not disabled (Tr. 90, 361-68). The doctor specifically considered the report from LMF's teacher regarding her school performance and behavior (see Tr. 206-13) and the report from Dr. Helprin (see Tr. 355-59) (Tr. 368). Dr. Ferrin opined that LMR's impairments did not meet, medical equal, or functionally equal the Listings of Impairments contained in 20 C.F.R. Part 404, subpart P, App'x 1 (Tr. 90, 363). In the domain of acquiring and using information, LMF had a less than marked limitation (Tr. 365). The doctor assessed that LMF had no limitations in the domains of attending and completing tasks, interacting and relating with others, moving about and manipulating objects, caring for herself, and health and physical well-being (Tr. 365-66).

In January 2011, LMF was given the Wechsler Intelligence Scale for Children-IV (WISC-IV) and it revealed that LMF's full scale IQ was 107 (68th percentile (average)), with scores of 110 in perceptual reasoning (75th percentile (high average)), 112 in processing speed (79th percentile (high average)), 102 in verbal comprehension (55th percentile

(average)), and 94 in working memory (34th percentile (average)) (see Tr. 376-77, 436-37).

In March 2011, LMF took the Wechsler Individual Achievement Test III (WIAT-III) and her basic reading score was 87 (19th percentile), reading comprehension and fluency score was 83 (13th percentile), and total reading score was 84 (14th percentile) (see Tr. 377-80, 385).

On March 20, 2011, Ms. Strassman evaluated LMF again (Tr. 374-84). She noted absences and a lack of focus and that LMF's grade average had declined to 64 in the fourth quarter of the 2009-10 school year, from 75-81 the first three quarters (Tr. 374). Ms. Strassman noted that she was a very serious test taker and thinker (Tr. 376). She considered the results from LMF's earlier WISC-IV, WIAT-III, and BASC 2 testing as well as information from reports, school records, and teachers (Tr. 375, 376). Mrs. Davis, her English language arts (ELA) teacher, described her as average in dealing with teachers and peers, although she was moderately submissive and introverted (Tr. 375). Learning behavior was average, except for being moderately high in persistence, organization, and stability (Tr. 375). Mrs. Davis stated that LMF gave good effort, but had

problems catching up if she fell behind (Tr. 375). LMF had friends, but told of being bullied (Tr. 375). Her math teacher, Mr. Hicks, described LMF as extremely cooperative and obedient and otherwise average or moderate, with some tendencies to daydream (Tr. 375). LMF was a hard worker, but sometimes forgot simple steps (Tr. 375-76). Mr. Hicks observed that LMF was always quiet and polite, and did not talk much with her peers (Tr. 376). Ms. Strassman observed a discrepancy between LMF's abilities and her performance in the areas of reading and total achievement (Tr. 383-84). She recommended that LMF be designated emotionally disabled or learning disabled in the area of reading, and that she receive special education and counseling services (Tr. 384).

On July 12, 2011, Dr. Trivedi completed an assessment form for the ALJ (Tr. 388-94). The doctor indicated that the LMF had no significant physical limitations and did not note any physical ailments (Tr. 388-94). The doctor indicated that she had difficulty counting money (Tr. 394). An undated and unsigned adult form, probably from Dr. Trivedi, indicated moderate limitations, addressed an adult's work-related functioning, and failed to set forth any supporting clinical

findings or test results in support of the assessment (Tr. 396-97).

In an undated medical report to SSA, completed sometime around August 29, 2012, Dr. Irving Stillman ("Dr. Stillman"), a psychiatrist, indicated that he had seen LMF monthly for the past year (Tr. 468; see Tr. 463). The doctor confirmed LMF had no history of psychiatric hospitalizations (Tr. 469). Diagnoses were dysthymia and learning disorder (Tr. 468). In response to a question seeking clinical findings and diagnostic test results to support the diagnosis, he responded only that no lab tests are appropriate for the diagnoses (Tr. 468). LMF's complaints and symptoms were anger, anxiety, and depression, treated with individual therapy two to four times per month and monthly medication management (Tr. 469). Current prescriptions were for Lexapro, Vyvanse, and Clonodin (Tr. 469). LMF did not report any medication side effects (Tr. 469). She was progressing towards her goals (Tr. 469). With respect to the domain of acquiring and using information, the doctor stated that LMF's processing "can be a little slow at times" and she had a hard time understanding certain things (Tr. 470). With respect to attending and completing tasks, he wrote that she had some limitations in a social setting and had difficulty staying

on track and focusing (Tr. 470). Dr. Stillman opined that LMF had no limitations in any other domains of functioning (interacting and relating with others, moving about and manipulating objects, caring for herself, and health and physical well-being) (Tr. 470-71). About the same time, he completed an undated assessment form (Tr. 463-67). He marked boxes to indicate that LMF had: marked limitations in the domains of acquiring and using information, and attending and completing tasks; less than marked limitations in the domains of caring for herself and health and physical well-being; and no limitations in the domains of interacting and relating with others, and moving about and manipulating objects (Tr. 465-66).

C. School Records and Teacher Reports

Mrs. Rosner, LMF's 4th grade teacher, completed a report for SSA in September 2010 (Tr. 206-13). Mrs. Rosner described LMF as a very sweet girl who tried most of the time (Tr. 213). LMF's problems were academic and her frequent absences towards the end of the school year affected her learning (Tr. 213; see Tr. 206). LMF was in a class with a student teacher ratio of 15:1 and her instructions levels were low (Tr. 206). She was provided special education services in

math and writing (Tr. 206). In the domain of acquiring and using information, LMF had obvious problems in three areas (comprehending oral instructions, understanding school and content vocabulary, and providing organized oral explanations and adequate descriptions), serious problems in six areas (reading and comprehending written material, understanding and participating in class discussions, expressing ideas in writing, learning new material, recalling and applying previously learned material, and applying problem-solving skills in class discussion), and a very serious problem in one area (comprehending and doing math problems) (Tr. 207). LMF was independent, but she did not do the work correctly and would ask for help only rarely (Tr. 207). In the domain of attending and completing tasks, LMF had a slight problem in five areas and no problem in eight areas (Tr. 208). Mrs. Rosner assessed that LMF had no problems in the domain of interacting and relating with others (Tr. 209-10). LMF also had no problem in the domain of moving about and manipulating objects or in the domain of caring for herself (Tr. 210-11). Mrs. Rosner knew LMF started medication towards the end of the school year, but was unaware of any medical conditions or problems with health and physical well-being (Tr. 212).

An individualized education program (IEP) for LMF was crafted in April 2011 (Tr. 434-39). The IEP noted Ms. Strassman's findings and LMF's performances on the WISC-IV and WIAT-III (Tr. 435-37; see Tr. 385). In the area of social development, LMF's problems with internalizing, causing anxiety, depression, and somatization, but it was also noted that she got along well with peers (Tr. 437). LMF's physical development was age-appropriate and there were no concerns with physical or motor skills (Tr. 437). LMF was assessed with a learning disability and mental health concerns, needing special services (Tr. 437-38). The IEP provided for a 15:1 student teacher ratio and that LMF would have a consultant teacher each weekday for 45 minutes and weekly counseling services (Tr. 434). LMF would be provided additional time on all tests, she would take tests in a special location, there would be checks for understanding during testing as allowed, and test directions and questions would be rephrased as needed (Tr. 435).

LMF passed fifth grade with grades of between 66 (literature) and 86 (writing) (Tr. 420). On August 8, 2011, Richard Hemmer, LMF's 5th grade teacher in math all year and for half the year in writing during the 2010-11 school year, completed a form (Tr. 400-07). In the domain of acquiring and

using information, LMF had no serious or very serious problems (Tr. 401). She had obvious problems in five areas (comprehending oral instructions, understanding school and content vocabulary, providing organized oral explanations and adequate descriptions, recalling and applying previously learned material, and applying problem-solving skills in class discussion), and slight problems in five areas (reading and comprehending written material, comprehending and doing math problems, understanding and participating in class discussions, expressing ideas in written form, and learning new material (Tr. 401). In the domain of attending and completing tasks, LMF had no problem in four areas and a slight problem in the other nine areas (Tr. 402). Mr. Hammer assessed that LMF had no problems in eight areas in the domain of interacting and relating with others and slight problems in five areas (Tr. 403). LMF also had no problem in the domain of moving about and manipulating objects (Tr. 404). The teacher indicated LMF had no problems in two areas of the domain of caring for herself and only slight problems in the other eight areas (Tr. 405). Mr. Hammer was unable to respond to questions about the domain of health and physical well-being and reported that LMF did not have an unusual number of absences (Tr. 400, 406).

An IEP for the 2011-12 school year noted Ms. Strassman's findings (Tr. 293-94; see Tr. 215-16). The IEP noted the WISC-IV results from January 2011 and the March 2011 WIAT-III results (Tr. 294). Her academic performance was documented, as well as her difficulty with reading comprehension and using context clues (Tr. 294-95, 385). LMF enjoyed sports and being with friends (Tr. 295). In the area of social development, LMF's problems with internalization, causing anxiety, depression, and somatization were noted, but it was explained that she got along well with peers, and counseling was recommended (Tr. 295). Her physical development was age-appropriate and there were no concerns with physical or motor skills (Tr. 295). LMF was assessed with a learning disability and mental health concerns and needed special services (Tr. 295).

In June 2012 Liberty Schools recommended that LMF attend a summer school program in a 15:1:1 special education setting to prevent regression (Tr. 452-62).

D. Testimony and Plaintiff's Reports to SSA

Shortly after the SSI application, Plaintiff completed a disability report and a function report about LMF (Tr. 178-87, 196-202). Plaintiff indicated that LMF had no physical limitations and had no problems seeing, hearing, talking, or communicating (Tr. 179-81, 183). She stated that LMF's impairments affected her behavior with others and stated that medication affected LMF's personality (Tr. 184). Plaintiff indicated that LMF had friends her own age, could make new friends, generally got along with adults and teachers, and played sports (Tr. 184). She was unsure whether LMF's abilities to progress in learning was limited (Tr. 182). Plaintiff noted LMF could not tell time; she could read, but not at the expected level, and she did not understand what she read (Tr. 182). Plaintiff indicated on the form that LMF did not understand money, but then stated that LMF just needed a little help with money (Tr. 182). Plaintiff was also not sure whether LMF's impairment affected her abilities to care for her personal needs (Tr. 185). LMF did not help around the house, did not wash her hair by herself, had trouble cutting her food, and did not accept criticism or correction (Tr. 185). She did what she was told most of the time "with a fight" (Tr. 185). LMF was able to use buttons, zippers, tie shoes, brush teeth, comb hair, choose clothes, hang up her clothes, put away toys, obey safety rules,

get to school on time, eat using utensils, and take a bath or shower without help (Tr. 185). Plaintiff was unsure whether LMF's ability to pay attention and stick with a task was limited (Tr. 186). She indicated that LMF did not finish things (Tr. 186). LMF started and completed homework if Plaintiff was helping her (Tr. 186). LMF kept busy on her own, worked on arts and crafts, and completed chores most of the time (Tr. 186). Plaintiff stated that when LMF did not take her medication, she got very depressed and did nothing (Tr. 187, 197).

In another report to SSA, Plaintiff stated that LMF was very shy and took time to warm up to others (Tr. 203). LMF had no problems in personal care activities (Tr. 203). She was able to play with others and by herself, and preferred to play by herself (Tr. 203). Plaintiff said LMF's behavior was worsening, she threw tantrums when she did not get her way, and she pinched herself or hit her head when frustrated (Tr. 203-04). LMF's homework was not improving, she was falling behind in school, and she was failing writing (Tr. 203-04).

In a medical treatment form, Plaintiff stated that Dr. Trivedi recently described her as doing well so long as medication was maintained (Tr. 300). Another form given to the

ALJ indicated that LMF's prescribed medications consisted of Vyvanse and Lamictal (Tr. 302).

LMF testified that she was born in 1999 (Tr. 71). She was in regular classes in school, and had extra help with tests and had an aide (Tr. 81-83). LMF attended summer school in order to retain material needed to advance and was going to start 7th grade in September 2012, and liked school (Tr. 72, 78, 79, 81). She sometimes missed school due to illness and other times was afraid to go because she was getting "picked on" (Tr. 82). LMF's grades were "fairly decent" (Tr. 72).

LMF had been seen by Dr. Stillman for about one year (Tr. 74). The doctor prescribed medication (Lexapro, Vyvanse, and Clonidine as needed) and she took the medication daily (Tr. 75-76). LMF later said that it was when she failed to take her medication that she got mad, frustrated, and avoided others (Tr. 80). The medicine also helped her concentrate (Tr. 80). LMF told the ALJ that the medicine enabled her to play and be normal (Tr. 80).

LMF also saw Dr. Trivedi when she felt ill (Tr. 75). LMF had complained that her stomach hurt, but tests found no

medical problem (Tr. 87). Plaintiff said the doctor explained to LMF that just because you did not feel good inside did not mean you were physically ill (Tr. 87).

When the ALJ asked whether LMF had school friends, she stated that she had two friends, and that other students were mean to her (Tr. 78-79).

Plaintiff stated that LMF's IEP seemed to be working for her, and she was not moved to a special education classroom (Tr. 85). In addition to learning problems, Plaintiff said LMF had depression, but the medications were helping (Tr. 85-86). LMF did not have many friends, and was picked on because she was slower than other schoolchildren (Tr. 86). Plaintiff stated that when LMF was being bullied, she became very depressed (Tr. 86). However, she now had episodes of slight depression and the medication did not let her get as low as before (Tr. 86).

In deciding LMF's SSI claim, the ALJ applied the three-step sequential evaluation analysis set forth at 20 C.F.R. § 416.924(a)-(d). At step 1, the ALJ found that LMF (a school-age child when the application was filed and an adolescent at the time of the hearing), had not engaged in substantial gainful

activity (Tr. 27). At step 2, the ALJ found that LMF's bipolar disorder and learning disorder were severe impairments within the meaning of the Act (Tr. 27). At step 3, the ALJ found that LMF's impairments did not meet or medically equal any impairment in the Listings (Tr. 27). Then, the ALJ evaluated her impairments and determined that they were not "functionally equivalent" to a listed impairment (Tr. 27-37). Specifically, the ALJ found that LMF's only limitation was a less than marked limitation in the domain of acquiring and using information (Tr. 28-30). The ALJ found that LMF had no limitations in the domains of attending and completing tasks (Tr. 30-31), interacting and relating with others (Tr. 31-33), moving about and manipulating objects (Tr. 33-34), caring for herself (Tr. 34-35), and health and physical well-being (Tr. 35-37). The ALJ found that LMF was not disabled (Tr. 37).

The Standard of Review

This Court reviews the Commissioner's decision by determining whether it is supported by substantial evidence and whether the Commissioner applied the correct legal standard. See Machadio v. Apfel, 276 F.3d 103, 108-09 (2d Cir. 2002). The Act provides that the "findings of the Commissioner as to any

fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g); Perez v. Chater, 77 F.3d 41, 46 (2d Cir. 1996). As the Second Circuit held in a child's SSI disability case, "[w]here an administrative record supports disparate findings," the reviewing court "must accept the ALJ's factual determinations." Quinones o/b/o Quinones v. Chater, 117 F.3d 29, 36 (2d Cir. 1997). Thus, if the Court finds that there is substantial evidence supporting the Commissioner's decision, the Commissioner's decision must be upheld, even if there is also substantial evidence for the plaintiff's position. See Alston v. Sullivan, 904 F.2d 122, 126 (2d Cir. 1990); Schauer v. Schweiker, 675 F.2d 55, 57 (2d Cir. 1982).

Substantial evidence has been defined as "more than a mere scintilla . . . [and] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Schaal v. Apfel, 134 F.3d 496, 501 (2d Cir. 1998) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)). In short, the reviewing court is not to decide the case de novo. Schaal, 134 F.3d at 501; Jones v. Sullivan, 949 F.2d 57, 59 (2d Cir. 1991).

The SSI program, 42 U.S.C. § 1381 et seq., is a federal program providing benefits to needy aged, blind, or disabled individuals who meet the statutory income and resource limitations.

The Social Security Act provides:

(i) An individual under the age of 18 shall be considered disabled for the purpose of this title if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

(ii) Notwithstanding clause (I), no individual under the age of 18 who engages in substantial gainful activity . . . may be considered disabled.

42 U.S.C. § 1382c(a)(3)(C).

Under the Commissioner's regulations, a sequential analysis is utilized to determine whether a child is disabled. 20 C.F.R. § 416.924(a)-(d). The 3-step process requires a child to show: (1) that she was not working; (2) that she had a "severe" impairment or combination of impairments; and (3) that her impairment or combination of impairments was of listing-level severity, i.e., the impairment(s) met, medically equaled, or functionally equaled the severity of an impairment in the

Listings. See 20 C.F.R. § 416.924. In addition, the regulations provide for a single method for determining functional equivalence based on domains of functioning. See 20 C.F.R. § 416.926a(b)(1). A child's functional limitations are evaluated in 6 domains:

- (i) Acquiring and using information;
- (ii) Attending and completing tasks;
- (iii) Interacting and relating with others;
- (iv) Moving about and manipulating objects;
- (v) Caring for yourself; and
- (vi) Health and physical well-being.

20 C.F.R. § 416.926a(b)(1)(i-vi).

Substantial Evidence Supports the Decision of the Commissioner

The Commissioner's regulations provide that when there is sufficient evidence for to decide whether an applicant is disabled, the Commissioner will make a determination or decision based on that evidence. See 20 C.F.R. § 416.927. Here, the State agency acted to develop the record (Tr. 370-73). The ALJ also acted to develop the record (see Tr. 245, 248, 262, 276, 303, 306, 308, 320).

The ALJ found that LMF did not have a marked or extreme limitation in any of the 6 domains of functioning (Tr.

27-37). In making these findings, the ALJ considered the relevant medical and educational evidence concerning LMF's functioning (Tr. 27-37). To establish disability, there must be more than subjective complaints. In particular, there must be an underlying physical or mental impairment, demonstrable by medically acceptable clinical and laboratory diagnostic techniques, which could reasonably be expected to produce the symptoms alleged. 20 C.F.R. § 416.929(b); accord Gallagher v. Schweiker, 697 F.2d 82, 84 (2d Cir. 1983). Here, for the reasons articulated by the ALJ, most notably the school reports from the educational professionals most familiar with LMF's day to day functioning in a challenging setting, constitute substantial evidence that LMF was not disabled as defined by the regulations.

The ALJ is "not required to specifically mention each piece of evidence in detail, and failure to do so does not require remand where, as here, the court can glean the ALJ's rationale from the rest of the decision." Cichocki v. Astrue, 11-755-S, 2012 WL 3096428, *7 (W.D.N.Y. July 30, 2012), aff'd, 729 F.3d 172 (2d Cir. 2013) (citing Mongeur v. Heckler, 722 F.2d 1033, 1040 (2d Cir. 1983)). The ALJ's evaluated the functional equivalence domains according appropriate weight to reports from

LMF's teacher and school, such as the report from Mr. Hammer, one of LMF's teachers, who indicated that she had no more than slight to obvious problems in any domain of functioning (Tr. 28, see Tr. 400-07). See Social Security Ruling ("SSR") 06-3 (it is appropriate to assign substantial weight to other sources such as teachers).

Notably, LMF's performance in Mr. Hammer's classes occurred after she was started on medication (Tr. 469). In the aggregate, the ALJ determined that the evidence of record demonstrated functional limitations in one of the six functional equivalence domains, but not to the disabling extent alleged (see Tr. 27-37).

The ALJ considered, but did not find persuasive, Dr. Stillman's undated assessment form (Tr. 463-67). In that form, he marked boxes to indicate that LMF had marked limitations in the domains of acquiring and using information, and attending and completing tasks; less than marked limitations in the domains of caring for herself and health and physical well-being; and no limitations in the domains of interacting and relating with others, and moving about and manipulating objects (Tr. 465-66). The ALJ noted that such limitations were

inconsistent with the doctor's clinical notes that confirmed LMF had no history of psychiatric hospitalizations that diagnoses were dysthymia and learning disorder (Tr. 468-69) and that treatment consisted only of individual therapy, two to four times per month, and monthly medication management, and LMF was progressing towards her goals (Tr. 469). Dr. Stillman stated, with respect to acquiring and using information, only that LMF's processing "can be a little slow at times" and she had a hard time understanding certain things (Tr. 470). Similarly, the doctor stated in the domain of attending and completing tasks, she had some limitations in a social setting and difficulty staying on track and focusing, not an indication of marked limitations in that domain (Tr. 470). Moreover, LMF's teachers contradicted his assessments in these domains (Tr. 207, 208, 214, 401, 402) and the school psychologist, Ms. Strassman, reported that LMF functioned in the average range regarding her attentiveness (Tr. 215-16). See 20 C.F.R. § 416.927(c)(2)-(4) (treating source's opinion entitled to less weight when unsupported and/or inconsistent with other evidence of record)

The record also contains an undated and unsigned report (Tr. 396-98). While it seems that Dr. Trivedi was sent an adult assessment form, rather than one for children, this

check box report indicated that LMF had disabling functional limitations. However, that form, as well as other forms from the doctor, failed to identify any supporting clinical findings or test results (Tr. 396-97; see Tr. 335-44). The doctor was contacted by the Commissioner, who did provide records (see, e.g. Tr. 306, 346). The doctor was not a mental health professional. The ALJ noted that the form was inconsistent with reports from LMF's teachers, Dr. Helprin's consultative report, and Ms. Strassman's reports (Tr. 36). The Plaintiff stated that Dr. Trivedi had described LMF as doing well so long as medication was maintained (Tr. 300).

If evidence in a claimant's case record is inconsistent with other evidence or is internally inconsistent, the ALJ is required to obtain additional evidence (including by recontacting medical sources) only if the ALJ cannot decide whether a claimant is disabled based on the existing evidence. 20 C.F.R. § 416.927(c). Here, substantial evidence existed to show that LMF was not disabled. Thus, the ALJ was not obligated to obtain additional evidence. 20 C.F.R. § 416.927(c); see Alston, 904 F.2d at 126 (if substantial evidence supports the Commissioner's decision, the decision must be upheld even if

there is also substantial evidence in support of plaintiff's position).

The Commissioner noted that the ALJ's evaluation of the functional equivalence domains is supported by the assessments of consultative examiner Dr. Helprin who, after examining LMF, opined that LMF was able to attend to, follow, and understand age-appropriate directions and complete several age-appropriate tasks (Tr. 358). She was generally able to maintain appropriate social behavior with some occasional difficulties (Tr. 358). LMF was able to respond appropriately to changes in her environment, and the psychologist observed that LMF behaved appropriately throughout the evaluation (Tr. 358). She generally interacted adequately with peers and adults (Tr. 358). Dr. Helprin assessed that examination findings appeared consistent with some emotional difficulties, but those difficulties themselves, particularly with current treatment, did not appear to be significant enough to interfere with LMF's ability to function on a daily basis (Tr. 358).

The ALJ's decision comports with the findings of State agency psychiatrist Dr. Ferrin, who evaluated the available evidence of record and assessed LMF's degree of functional

limitation (see Tr. 361-68). Dr. Ferrin considered reports from one of LMF's teachers and the consultative examination report from Dr. Helprin (Tr. 368). Dr. Ferrin assessed that LMF had severe impairments, but that they did not meet, medical equal, or functionally equal the Listings of Impairments contained in 20 C.F.R. Part 404, subpart P, App'x 1 (Tr. 90, 363). In the domain of acquiring and using information, LMF had a less than marked limitation (Tr. 365). The doctor assessed no limitations in the domains of attending and completing tasks, interacting and relating with others, moving about and manipulating objects, caring for herself, and health and physical well-being (Tr. 365-66). The ALJ was entitled to rely upon the State agency consultant. See 20 C.F.R. §§ 416.912(b)(6), 416.927(e)(2). Non-examining sources, such as Dr. Ferrin, may override treating sources' opinions, provided their opinions are supported by record evidence. 20 C.F.R. § 416.927(e); see Schisler v. Sullivan, 3 F.3d 563, 568 (2d Cir. 1993); cf. Schisler v. Bowen, 851 F.2d 43, 47 (2d Cir. 1988) ("Where the opinion of a treating source is being rejected or overridden, there must be a discussion documented in the file of the opinion(s) and medical findings provided by the medical sources, an explanation of how SSA evaluates the reports, a description of any unsuccessful efforts to obtain information from a source(s), the pertinent

nonmedical findings, and an explanation as to why the substantial medical evidence of record contradicts the opinion(s) of a treating source(s). This discussion must be set out in a determination or decision rationale.”)

Genuine conflicts in the evidence are for the Commissioner to resolve. The ALJ properly exercised his discretion in this case. See Veino v. Barnhart, 312 F.3d 578, 588 (2d Cir. 2002); 42 U.S.C. § 405(g) (providing that the Commissioner’s findings “as to any fact, if supported by substantial evidence, shall be conclusive”); see also Schaal, 134 F.3d at 504 (“It is for the SSA, and not this court, to weigh the conflicting evidence in the record”). Here, the ALJ evaluated the educational evidence and the medical record, and assessed only a “less than marked” limitation in one of the functional equivalence domains (see Tr. 27-37).

The domain of Acquiring and Using Information focuses on how well the child acquires, learns, and uses information. 20 C.F.R. § 416.926a(g). Based on all of the evidence of record, the ALJ found that LMF had a “less than marked” limitation in this area (Tr. 28-30). The ALJ noted Ms. Strassman’s behavioral assessment (BASC 2) in March 2010 that

indicated LMF's reported problems were mostly at home, not in school (Tr. 215-16). Mrs. Rosner, LMF's teacher, described her as getting along well with others, using time wisely, and making a good effort (Tr. 214). LMF's adaptive abilities in school were average (Tr. 216). Ms. Strassman attributed LMF's difficulties to adjusting to new living arrangements (Tr. 216). Although Dr. Helprin assessed LMF's cognitive function as "below average," IQ testing in fact showed that her abilities were in the average range (see Tr. 357, 376-77, 436-37). Moreover, with respect to this domain, Dr. Stillman stated only that LMF's processing "can be a little slow at times" and that she had a hard time understanding certain things (Tr. 470). The IEP for 2011-12 noted she had some problems in reading comprehension and use of context clues, but could solve math problems (Tr. 294-95). Teacher questionnaires indicated that LMF had some problems in acquiring and using information (Tr. 207, 401). Mrs. Rosner noted that LMF did not always do her work correctly, but described LMF a student who tried most of the time and was independent (Tr. 207, 213). Mr. Hicks, another teacher, described LMF as extremely cooperative and obedient and otherwise average or moderate (Tr. 375). Notably, LMF passed fifth grade with scores of between 66 (literature) and 86

(writing) (Tr. 420). Accordingly, the ALJ found a less than marked limitation in Acquiring and Using Information.

The domain of Attending and Completing Tasks considers how well the child focuses and maintains her attention, and how well she begins, carries through, and finishes activities, including the pace at which she performs activities and her ease in changing activities. 20 C.F.R. § 416.926a(h). The ALJ found that LMF had no limitation, which the record supports (Tr. 30-31). The ALJ noted that Ms. Strassman reported that, despite her problems, LMF functioned in the average range regarding her attentiveness (Tr. 215-16). In the domain of Attending and Completing tasks, both Mrs. Rosner and Mr. Hammer assessed that LMF had no more than slight problems (Tr. 208, 402). Similarly, Dr. Stillman assessed only some limitations in a social setting and had difficulty (but not serious difficulty) staying on track and focusing (Tr. 470). Dr. Helprin found LMF's attention and concentration were only mildly impaired (Tr. 357). Plaintiff herself was unsure whether LMF's ability to pay attention and stick with a task was limited (Tr. 186) and LMF passed 5th and 6th grade (Tr. 72, 420). Consequently, the ALJ properly assessed no limitation in Attending and Completing Tasks. Even if the few, slight limitations in some reports were adopted,

there would be no more than a "less than marked" limitation, and the finding of "no limitation" would amount to harmless error. The Supreme Court has held that, in judicial review of administrative proceedings, the burden of showing harmful error normally falls upon the party attacking the agency's determination. Shinseki v. Sanders, 556 U.S. 396, 410-11 (2009).

The domain of Interacting and Relating with Others considers how well the child initiates and sustains emotional connections with others, develops and uses the language of her community, cooperates with others, complies with rules, responds to criticism, and respects and takes care of the possessions of others. 20 C.F.R. § 416.926a(i). Here, the ALJ correctly found that LMF had no limitation in Interacting and Relating with Others (Tr. 31-33). Mrs. Rosner described LMF as getting along well with others and reported that LMF had no problems in this domain (Tr. 209-10, 214). Mr. Hammer assessed that LMF had no more than a slight problem in the domain of Interacting and Relating with Others (Tr. 403). Plaintiff indicated that LMF had friends her own age, could make new friends, generally got along with adults and teachers, and played sports (Tr. 184). Plaintiff told Dr. Helprin that LMF had good family

relationships and adequate peer relationships (Tr. 358). The 2011-12 IEP also indicated LMF enjoyed sports and being with friends (Tr. 295). The ALJ's finding of no limitation in Interacting and Relating with Others was well supported.

The domain of Moving About and Manipulating Objects is concerned with how well the child moves her body from one place to another and how well she moves and manipulates things. 20 C.F.R. § 416.926a(j). The ALJ found that LMF had no limitation in this domain (Tr. 33-34). The ALJ noted, there was no evidence that LMF had any motor or physical limitations (Tr. 33). Records from Liberty Pediatrics did not show any significant abnormalities. Dr. Stillman and Dr. Trivedi did not diagnose LMF with any physical impairment or limitation (Tr. 270-71, 335-346, 347-50, 388-94). Similarly, her teachers did not indicate any such limitations in their reports (Tr. 201, 404). Moreover, Plaintiff alleged no difficulty with LMF's physical abilities and stated that LMF assisted with chores (Tr. 358). She played basketball with school groups (Tr. 358). The ALJ properly assessed no limitation in Moving About and Manipulating Objects.

The domain of Caring for Self considers how well the child maintains a healthy emotional and physical state, including how well her physical and emotional needs met in appropriate ways, how she copes with stress and changes in her environment, and whether she cares for her own health, possessions, and living area. 20 C.F.R. § 416.926a(k). Here, the ALJ's finding that LMF had no limitation in this domain is supported by substantial evidence (Tr. 34-35). The ALJ noted that the record demonstrates that LMF could dress, bathe, and groom herself, was capable of traveling in the neighborhood independently, and assisted with some chores at home (Tr. 358). Further, her teachers reported no limitations in this domain (Tr. 211, 405). The record supports the ALJ's finding that LMF had no limitation in Caring for Herself.

The domain of Health and Physical Well-Being concerns the cumulative effects of physical or mental impairments and treatments or therapies on the child's functioning that were not considered under the domain of Moving About and Manipulating objects. 20 C.F.R. § 416.926(l). The ALJ determined that LMF had no limitation in this domain (Tr. 35-37). As the ALJ stated, the record documents LMF's mental problem, but shows that she was never hospitalized and treatment consisted only of

therapy and monthly visits to a psychiatrist (Tr. 355). Dr. Helprin opined that LMF's difficulties did not appear significant enough to interfere with her daily functioning (Tr. 358). Both Dr. Ferrin and Dr. Stillman assessed that LMF had no limitations in this domain (Tr. 366, 471). Thus, the ALJ's conclusion that of no limitation in this area is well supported (Tr. 35-36).

Because the evidence established that LMF did not have an extreme limitation in any single area of functioning, or marked limitations in any two areas, her impairments were not functionally equivalent to a listed impairment.

The Plaintiff has asserted that the ALJ did not adequately explain the credibility finding. However, the ALJ decides issues of credibility and is "not require[d] to accept the claimant's subjective complaints without question." Genier v. Astrue, 606 F.3d 46, 49 (2d Cir. 2010). Deference should be given his judgment since he heard the witnesses testify and observed their demeanor. Gernavage v. Shalala, 882 F. Supp. 1413, 1419 n.6 (S.D.N.Y. 1995); Serra v. Sullivan, 762 F. Supp. 1030, 1034 (W.D.N.Y. 1991). An ALJ need not blindly accept a

plaintiff's allegations of disability. Fuller v. Shalala, 898 F. Supp. 212, 217 (S.D.N.Y. 1995).

The ALJ, in assessing LMF's functioning under the six domains, considered all symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical and other evidence, based on the requirements of "20 C.F.R. [§] 416.929 and SSRs 96-4p and 96-7p" (Tr. 28). The regulations and rulings to which the ALJ referred govern the credibility analysis. The ALJ explicitly considered many of the factors outlined in the regulations, including but not limited to objective findings, medical and non-medical treatment, teacher's reports, activities of daily living, and the testimony of LMF and her mother (see Tr. 27-37). See 20 C.F.R. § 416.929; SSR 96-7p ("One strong indication of the credibility of an individual's statements is their consistency, both internally and with other information in the case record").

Here, the allegations of disabling limitations alleged by the Plaintiff are contradicted by teacher's reports that revealed some limitations, but not near disabling severity, and by substantially normal clinical findings by treating and examining sources. Moreover, the Plaintiff herself indicated

that LMF had no physical limitations and had no problems seeing, hearing, talking, or communicating (Tr. 179-81, 183). The Plaintiff stated that Dr. Trivedi had described LMF as doing well, so long as medication was maintained (Tr. 300). LMF herself stated that her medication calmed her down and helped her sleep and concentration (Tr. 80, 81). Further, she testified that it was only when she failed to take her medication that she got mad, frustrated, and avoided others (Tr. 80). LMF told the ALJ that when she took her medicine, she was normal (Tr. 80).

"The ALJ's rationale for his adverse credibility decision is evident from his references to the . . . record . . . as well as to opinions from two state agency medical consultants. . . . This was substantial evidence supporting the ALJ's decision not to credit [other evidence]." Lowry v. Astrue, 474 Fed. Appx. 801, 805 (2d Cir. 2012).


The ALJ correctly determined that the evidence of record demonstrated functional limitations only in one of the six functional equivalence domains, but not to the disabling extent alleged (see Tr. 27-37).

Conclusion

Based on the conclusions set forth above, the motion of the Plaintiff is denied and the motion of the Commissioner for judgment on the pleadings is granted and her decision is affirmed.

It is so ordered.

New York, NY
February 6, 2015



ROBERT W. SWEET
U.S.D.J.